NO. 21017

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE W. PEMBROOK,
Petitioner-Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,
Respondent-Appellee.

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California
ROBERT R. GRANUCCI
Deputy Attorney General
JAMES A. AIELLO
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-3259

Attorneys for Appellee

FILED

SEP 1 1966

WM. B. LUCK, CLERK

NOV 4 1966

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE W. PEMBROOK,)
)
Petitioner-Appellant,)
)
vs.) No. 21017
)
LAWRENCE E. WILSON, Warden,)
California State Prison,)
San Quentin, California,)
)
Respondent-Appellee.)

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, United States Code sections 2241, 2242, and 2243. The jurisdiction of this Court is conferred by Titled 28, United States Code section 2253, which makes a final order[1] in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United

---

[1] For a discussion as to whether an order such as is herein appealed from is final and appealable, see Application of Hodge, 248 F.2d 843, 844 (9th Cir. 1957).

States District Court for the Northern District of California, Southern Division, denying his motion seeking permission to file his application for a writ of habeas corpus in forma pauperis.

A. Proceedings in the State Courts

On December 2, 1960, appellant was found guilty of a violation of California Penal Code section 192, manslaughter, a felony (AOB 2). He was subsequently sentenced to serve the term prescribed by law. There was no appeal.

Appellant caused applications for the writ of habeas corpus to be filed in the Superior Court for the County of Marin on November 24, 1965, (TR[2] 23-25) and in the California Supreme Court on December 10, 1965, both of which were denied without comment (AOB 2).

B. Proceedings in the Federal Courts

On March 2, 1966, appellant filed a motion seeking permission to file an application for a writ of habeas corpus in forma pauperis in the United States District Court for the Northern District of California, Southern Division (TR 10). The Honorable Lloyd H. Burke denied the motion on March 9, 1966. In that order, the following recital was noted: "The proposed petition raises the Escobedo issue. Escobedo v. Illinois does not operate retroactively to effect convictions

---

[2] "TR" refers to the Transcript of Record of the proceedings in the District Court.

final before that decision. Carrizosa v. Wilson, 244 F.Supp. 120 (D.C. Cal. 1965)." (TR 27).

On April 25, 1966, Judge Burke granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis (TR 35).

On May 6, 1966, notice of appeal was filed by appellant.

APPELLANT'S CONTENTIONS

On this appeal appellant contends (1) that the mere fact that Carrizosa v. Wilson prevents collateral attack on convictions final prior to Escobedo v. Illinois, does not curtail appellant's reliance upon other decisions in this area, (2) to refuse appellant in view of Carrizosa v. Wilson, where appellant's incriminating statement is the sole basis for his conviction, is to deny him equal protection of the law where prior decisions rendered by Federal Courts substantiate appellant's claim of a constitutional violation.

SUMMARY OF APPELLEE'S ARGUMENT

The denial of appellant's motion seeking permission to file an application for a writ of habeas corpus in forma pauperis, an act within the discretion of the District Court, was manifestly correct in view of the frivolous nature of the contentions raised in the petition.

/

/

ARGUMENT

Appellant treats the denial of his motion seeking permission to file an application for a writ of habeas corpus in forma pauperis as the denial of his application for a writ of habeas corpus, and he argues extensively the merits of his petition. However, the sole issue on this appeal is the correctness of the District Court's denial of his motion seeking permission to file in forma pauperis, as the merits of the petition were not reached. Anderson v. Heinze, 258 F.2d 479, 483 (9th Cir. 1958), cert. denied, 358 U.S. 889 (1958).

A motion to proceed in forma pauperis on an application in the District Court by a state prisoner for a writ of habeas corpus is to be granted unless the issues presented are plainly frivolous. In making that determination, the District Court examines the papers before it. If it finds that the application has no merit, and would be denied without a hearing in the event of a nonindigent application, a motion to proceed in forma pauperis is to be denied. If the reason for the denial is supported by the record, it will be affirmed on appeal. Anderson v. Heinze, supra, p. 483.

The reason given by the District Court in the instant case was:

> "The proposed petition raises the Escobedo issue. Escobedo v. Illinois does not operate

> retroactively to effect convictions final before that decision. <u>Carrizosa</u> v. <u>Wilson</u>, 244 F.Supp. 120 (D.C. Cal. 1965)." (TR 27).

Our sole inquiry on this appeal, then, is whether the papers on file in this case support the denial on this basis. <u>Anderson</u> v. <u>Heinze</u>, <u>supra</u>, 483.

The grounds upon which appellant based his allegation that he was being held in custody unlawfully are the following:

> "(a) Petitioner was held incommunicado for almost three days, and denial of counsel at interrogation.
>
> "(b) Unnecessary delay in being taken before a Magistrate (over 80 hours) and ineffective aid of counsel and failure of State Official's to advise petitioner of his Constitutional Right's to remain silent and his right to counsel.
>
> "(c) Lost of jurisdiction in the examinating court and psychological coercion, by witholding the nature of the charge until after petitioner gave a statement." (sic) (Petition, pp 3-4, TR 3-4).

In his argument, (Petition, pp. 9-12, TR 18-21), appellant focused on the <u>Escobedo</u> aspects of his grounds (a) (b) and (c), and asserted with particular emphasis that a confession obtained in violation of <u>Escobedo</u> had been

introduced at his trial (Petition, p. 10, TR 19). Clearly, then, the District Court's denial of the motion was correct. *Johnson* v. *New Jersey*, 34 U.S.L. Week 4592 (1966).

Of course, delay in taking before a magistrate, *i.e.*, delay in arraignment, does not present a federal question, *Anderson* v. *Heinze*, *supra*, p. 484, and see fn. 9(2), and, the allegation of ineffective aid of counsel, based, as it is, upon the fact that counsel allowed the confession to go into evidence (Petition, p. 4, TR 4), must fall with its basis, the *Escobedo* argument. Appellant also made a passing charge that the statement he gave to the police was coerced (Petition, p. 4, ground (c), TR 4). The coercion consisted of the fact that he was held "incommunicado" for "almost" three days, and the police officers did not tell appellant that his wife was dead until after he had given his statement (Petition, pp. 3, 4, TR 3-4).

In his brief on appeal, appellant strays from his *Escobedo* argument, and places emphasis on this theory of coercion. Of course, the denial of appellant's motion on grounds that *Escobedo* does not apply retroactively does not prejudice appellant's right to assert on habeas corpus that his confession was coerced, *Davis* v. *North Carolina*, 34 U.S.L. Week 4597 (1966). However, for purposes of the instant application, it is clear that the factual allegations in this regard are only conclusionary, and thus

insufficient to predicate a reversal of the District Court's decision. Schlette v. California, 284 F.2d 827, 833-34 (9th Cir. 1960).

The mere fact that appellant was held incommunicado for "almost" three days (Petition, p. 3, TR 3, AOB 9), or that the interrogating officers would not tell appellant that his wife was dead until he made a statement (Petition, p. 4, TR 4, AOB 12-13) are merely factors which might indicate an involuntary statement. Davis v. North Carolina, supra, p. 4598. It is noteworthy that appellant does not explain how the asserted actions of the police caused him to make a statement. He merely states that it was "induced by psychological coercion" (AOB 13). Clearly this allegation does not fulfill the particularity requirement which is a prerequisite for the relief appellant seeks. Schlette v. California, supra.

Furthermore, since this issue was raised in appellant's initial petition, presumably the District Court considered it in denying appellant's petition, and as the record supports that denial, the decision must be affirmed on this appeal. Anderson v. Heinze, supra.

Notwithstanding the above, the District Court's decision was correct for another reason, which also appears on the face of the petition, i.e., that appellant has deliberately by-passed available state remedies. Neither

appellant nor his trial counsel raised the coercion issue at trial. Appellant did not appeal his conviction, even though he could have raised the coercion issue on appeal for the first time. People v. Rand, 202 Cal.App.2d 668 (1962). He did not ask for leave to file late notice of appeal, as is provided for under California Rules of Court, Rule 31(a), People v. Curry, 62 Cal.2d 207 (1965), and he did not ask for a hearing in the California Supreme Court. In re Notz, 62 Cal.2d 423 (1965). Clearly appellant by-passed presently available state remedies, and was therefore not entitled to file his application. Nelson v. California, 346 F.2d 73, 77-80 (9th Cir. 1965).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's motion seeking permission to file an application for a writ of habeas corpus in forma pauperis should be affirmed.

DATED: August 31, 1966.

THOMAS C. LYNCH, Attorney General
of the State of California
ROBERT R. GRANUCCI
Deputy Attorney General

James A Aiello

JAMES A. AIELLO
Deputy Attorney General

Attorneys for Appellee

JAA:lp
24CRSF
66-319

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: August 31, 1966.

James A Aiello

JAMES A. AIELLO
Deputy Attorney General